



A regular review of legal developments in the world of property and casualty insurance claims **December 2008**

EMPLOYERS LIABILITY POLICY TRIGGER

Durham v. BAI (Run-Off) Ltd (lead case 1) - 2008 (QBD)

This case was brought by four run-off insurers following the Court of Appeal decision in Bolton MBC v MMI & CU (“Bolton”) in 2006. That case established that public liability policies which are usually worded “injury occurring during the period of insurance” covered the date the injury occurred and not the period when the claimant was exposed to asbestos. The four defendant insurers all had wordings such as “injury sustained (and/or contracted) during the period of insurance” and argued that these wordings were similar to the public liability wording in “Bolton” and, therefore, they only covered the date when the injury or disease occurred. The disease in all of these cases was malignant mesothelioma which is a cancer of the pleura surrounding the lungs, is invariably fatal and in the Bolton case was held to occur 10 years (give or take one year) prior to either first symptoms becoming apparent or diagnosis of the condition. This was an estimate as to the point in time when the tumour escaped the body’s defence mechanisms and the disease became inevitable, even though the sufferer would be unaware of it at that time.

In a very detailed judgement and after considering the factual matrix surrounding the issue, the commercial purpose of employers liability insurance and the fact that insurers have paid such claims on an exposure basis for over 50 years the High Court ruled that, whilst there was no injury at the time the asbestos dust was inhaled, it was only consistent with public policy and the approach of the courts in ensuring that employees could look to insured employers, to construe the words “contracted” and “sustained” as meaning “caused” or “be caused”. This meant that the policies covered the period of inhalation or exposure to asbestos dust and not when the tumour started to develop.

Having heard evidence from a medical research professor and two microbiologists in addition to the two consultant chest surgeons the judge also ruled on the date at which the

disease occurred, and, in view of the further evidence, did not consider himself bound by the Court of Appeal finding in “Bolton” on the same issue. The tumour escapes the body’s defence mechanisms at the point of angiogenesis, when it obtains its own blood supply and starts to grow exponentially. This will usually be 5 years before diagnosability or manifestation of the disease unless there is evidence that the tumour is growing either unusually quickly or unusually slowly.

Comment

The position contended for by the four run-off insurers would have left gaps or “black holes” in the insurance cover of both companies and local authorities despite these organisations having been insured throughout the relevant periods. As the numbers of mesothelioma claims are still rising this could have led to companies going bankrupt, increased claims costs on the public purse and claimants going uncompensated because their former employer had since gone out of business leaving no relevant insurer. Whilst leave to appeal has been granted it seems likely, even if the appeals succeed, that the government would intervene in order to ensure that mesothelioma victims receive full compensation as it has already done by means of the Compensation Act following the Barker judgement. Nevertheless, it is expected that the appeal will proceed.

It is arguable that this judgement changes the general practice of insurers who do not contribute to claims where their period of exposure is within 10 years of the manifestation of symptoms because further exposure to asbestos could not affect a tumour that was already growing. The implication is that no contribution is now due only within 5 years of manifestation providing of course that exposure was continuing. It is also now arguable that claims under public liability policies should be dealt with by the insurer on risk 5 years prior to symptoms becoming manifest, effectively overruling the Bolton judgement on this point.



CAUSATION - APPLICATION OF THE FAIRCHILD EXCEPTION TO THE 'BUT FOR' TEST

Sanderson v. Hull - 2008 - CA

The claimant was employed as a turkey plucker for a temporary period prior to Christmas 2003. She became ill and was diagnosed with campylobacter enteritis. It was alleged that the employer had failed to protect her from the risk of infection inherent in handling dead poultry. At first instance it was held that the employer was in breach of his statutory duty but the claimant had failed to prove that 'but for' the breach of duty she would not have contracted the infection. Significantly, though the judge held that the claimant had established the causal link by showing that the breach of duty had *materially increased* the risk of infection adopting the exception provided in Fairchild. Whilst in appropriate cases the exception is not limited to cases of mesothelioma it was held on appeal that it did not extend to this case. For the exception to apply the claimant must show, inter alia, that there is some other exposure which could have been a potential cause of the injury but it is scientifically impossible to show which had caused the injury. Had the judge at first instance properly analysed the facts he would have been able to have made a decision on the usual 'but for' basis.

Comment

Whilst confirming that Fairchild is not limited to cases of mesothelioma it shows that great care will be taken by the courts before it is developed further. As such this decision provides some useful guidance and emphasises the need for the claimant to show it is impossible based on current scientific knowledge to prove how an injury was caused.

LIABILITY - ANIMALS ACT 1971

Freeman v. Higher Park Farm - 2008 - CA

The defendant organised a hack and had assessed the claimant as an experienced rider. The horse had a habit of bucking when going into canter but was not considered to be dangerous. The claimant was entirely happy to ride the horse having been advised that it may buck and having been offered an alternative. On the hack as the horse was about to go into a canter it bucked, the ride was stopped. The claimant confirmed that she wished to continue but as the horse went into a canter a second time it gave 2-3 large bucks and the claimant fell off.

In summary, The Animals Act 1971, S.2(2) provides that the keeper of the animal (not belonging to a dangerous species) is liable for injury, where same is likely to be severe, and, this was due to unusual characteristics not normally found in that species except at particular times and in particular circumstances known to the keeper. The act also provides that a person is not liable for injury suffered by a person who has voluntarily accepted that risk.

At first instance the judge held that the claim failed. There was no evidence that the horse had ever bucked in the same manner or that anyone had ever fallen off her before so the

damage was not likely to be caused. Further, given the history of bucking, it could not reasonably be expected that the horse would buck in such a way that the claimant would fall and suffer the injury that she did. The judge also considered that the relevant characteristic was "occasional bucking when going into a canter" and he could not find that injury was likely because of a characteristic of bucking which is not normally found in other horses. Finally, it was held that in any event the claimant voluntarily accepted the risk of carrying on with the ride and being thrown.

The Court of Appeal held that the judge had concentrated on the likelihood that the horse would buck in such a way that the claimant would fall off. The consideration should be the likely severity of the damage of the kind actually suffered, should that kind of damage be caused. In this case it would be reasonable to assume severe injury would result in these circumstances. The judge was entitled to find that the claimant had not established that bucking was not a normal characteristic of horses generally and nor was there evidence that horses bucked in particular circumstances. In any event, the judge was correct that the defendant was excepted from liability under the Act. The claimant voluntarily assumed the risk and its consequences.

LIABILITY - CONTRIBUTION - RTA

Lindesay v. Lamb & Tatner - 2008 - CA

In a claim arising from a multiple car accident the claimant, Lindesay, established liability against the defendant, Lamb, subject to contributory negligence. Lindsey was riding a scooter and Lamb was driving a taxi. A car ahead had developed a puncture and had pulled over and stopped on the near side. Several vehicles had managed to brake and avoided hitting the car, however, the taxi driver did not stop in time and hit the car in front. The scooter was behind the taxi and behind the scooter was a lorry. The accident happened in a split second, the lorry braked hard and swerved to the left striking the back of the taxi. The scooter came into contact with both the lorry and the taxi. The lorry driver was negligent for not observing the scooter and not allowing more space. He was, therefore, too close to the scooter when the emergency arose. The lorry driver sought a contribution from the taxi driver because he had created the emergency situation by braking unexpectedly and colliding with the vehicle in front. The taxi driver argued that he had to brake sharply and, whilst he had not avoided the car in front, this was not the cause of the accident. The accident would still have happened even if the taxi had not hit the car in front. The issue in these cases is whether the vehicle in front, in this case the taxi, unnecessarily put the vehicles behind him in difficulty and whether the taxi had sufficient space to stop without emergency braking whilst paying proper attention. The claim for contribution by the lorry driver failed both at first instance and on appeal.



LIABILITY - RTA - TURNING INTO MAIN ROAD FROM SIDE ROAD

Heaton v. Herzog - 2008 - CA

A driver who turns from a side road into a main road must take extreme care before moving off and during the manoeuvre, especially where the driver's line of sight is reduced and he has local knowledge of the dangers of a particular road. In the instant case the driver was involved in a collision with a motorbike driving at excessive speed along the main road. Her line of sight, whilst restricted by several parked cars, was such that she would have seen the motorbike coming had she looked to her right for a few seconds after moving off and not maintained a forward line of vision as she had. There would have been ample opportunity to avoid the accident. The motorbike was held primarily to blame for the accident but the claimant's damages were reduced by 25% in respect of her contributory negligence.

DAMAGE - RECOGNISABLE PSYCHIATRIC INJURY

Hussain v. Chief Constable of West Mercia - 2008 - CA

The claimant appealed against a decision to strike out his claim against the defendant for misfeasance in public office. He had alleged that in the course of his work as a taxi driver he had been involved in numerous incidents with the public for which he had called on police assistance. He complained that they had failed to deal with matters properly and that they had subjected him to racially motivated hostility. Psychiatric evidence was provided that he had experienced significant anxiety symptoms at times of stress, sometimes causing physical discomfort and numbness but did not have a diagnosable psychiatric condition. The claim was struck out on the grounds that he could not establish that he had suffered damage or injury sufficient to constitute the tort of misfeasance in public office. The Court of Appeal held that there had to be material damage, which normally means a recognised psychiatric illness, not just distress or any other normal emotion. The numbness of his arm and leg were transient and were not a physical injury or damage so as to amount to material damage.

Comment

There was some disagreement about whether a recognised psychiatric injury alone was sufficient to constitute material damage in misfeasance claims. Maurice Kay LJ (obiter) thought that (as an exception to other claims in negligence) non-physical injury short of recognised psychiatric disorder might be sufficient where a claimant, who had the robustness to avert a recognised psychiatric illness, nevertheless foreseeably suffers a grievous non-physical reaction as a consequence of the misfeasance. It seems that such comments may be driven by the general lack of a physical injury in misfeasance claims generally.

INTERIM PAYMENTS - CATASTROPHIC INJURY

Brewis (a minor) v. Heatherwood & Wrexham Park Hospitals NHS Trust - 2008 - QBD

The claimant sustained serious brain injury and cerebral palsy as a result of errors made during labour. The applicant sought an interim payment of £950,000 to purchase a suitable property and to adapt it for his particular needs. A reasonable estimate of damages in the claim was found to be £1M for past losses (including general damages) and relocation and adaptation costs but not taking into account future loss of earnings. Interim payments of £168,000 had already been made. The defendant submitted that the court should not award a sum so large that it would affect the amount and scope of periodical payments that may be ordered at trial or that it would act as an incentive to delay the trial. Having reduced the expert's figures for purchase and construction costs (in view of the economic climate since the expert reported) the amount of the interim payment required to meet the claimant's needs was within the sum of likely damages to be awarded. The claimant was awarded the sum of £880,000. The court found that the interim payment did not need to be reduced because of the future level of periodical payment orders or the risk of some discount or postponement of such an order. The claimant was entitled to a capital sum sooner rather than later to obtain suitable accommodation. The court also rejected the notion that the trial may be delayed by placing faith in its case management powers.

Comment

This is another example where a defendant has been unable to oppose a significant interim payment application in a catastrophic injury claim. The concern for the defendant in such cases is quite how critical a court will be of past expenditure when it comes to the final assessment of damages and this is perhaps more so if to do so would reduce the prospects or the level of a periodical payment. It is, therefore, important that in defending an application the defendant has its evidence in order on the reasonableness of the claims put forward if it is to resist the level of the interim payment and protect its position at a later assessment.

To show that claimants do not always get their own way it is worth noting the subsequent case of *Pitcher v. Headstart Nursery, Gooding & Mayday NHS Hospital Trust*. The court did not agree to the applicant's request for further interim payment of £950k for private nursing and care costs where a previous interim payment of £1M had been made. There was some distance between the parties' respective valuations, however, the court made an assessment of the likely value of past losses and aspects of future losses which would be capitalised at £1.7M and awarded an interim payment of £320,000. It was not appropriate to assume that the entirety of the future losses should be capitalised because to do so would unduly fetter the trial judge's discretion.



DAMAGES - FUTURE CARE

XXX v. A Strategic Health Authority - 2008 - QBD

X suffered from cerebral palsy, he was dependent on other people for everything. Throughout his life he had been cared for by his parents. It was intended that over the next two years a care regime would be implemented by a team of paid carers and that the cost would be recovered by periodical payments. This case is of interest simply because of what X was found to be entitled to. Whilst he did not require two people for much of the time he required two people to move him and, therefore, he was entitled to two carers except for 8 hours overnight. The cost of care would be calculated on a 60-week year to allow for training and holidays. Provision was made for a team leader at an enhanced rate of pay, an allowance was given for out of hours work and team meetings as well as employer pension contributions of 3%. On top of two carers, an allowance of 4 hours a week domestic assistance was given so that carers would not be wholly responsible for the housework.

LIABILITY - WRONGFUL ARREST - FALSE IMPRISONMENT

Commissioner of Police of the Metropolis v Raissi - 2008 - CA

A claim for damages for wrongful arrest and false imprisonment was upheld on appeal. The claimant was arrested and detained on suspicion of involvement in the 9/11 attacks on the USA. In making the arrest the arresting officer had relied on the fact that, in providing him with instructions, more senior officers must have additional information to which he was not privy. There was no reasonable grounds for the arresting officer's own subjective suspicion that the claimant may be involved in terrorism, the test is an objective one and it is the knowledge actually possessed that must be judged reasonable or otherwise. There was no evidence that, in fact, the arresting officer was provided with any more information by his superiors than the information he gave in evidence.

FRAUD - COSTS ORDER AGAINST A NON-PARTY

Farrell & Short v. Birmingham City Council & DAMS Ltd - 2008 - CC

Whilst only a first instance decision this case will assist in credit hire cases where fraud is alleged and proven. Following a collision with a refuse lorry DAMS provided the first claimant with a hire car and instructed solicitors to recover the cost. Information then came to light suggestive that there had been no accident at all. At trial the claimants, faced with allegations of fraud, discontinued their claims. A costs order was made against DAMS because they had been the instigators and beneficiaries of the litigation, had controlled the litigation to some extent and funded the litigation by means of a referral to solicitors acting on a CFA. ATE insurance had refused the claimants an indemnity.

List of abbreviations used:

CC	County Court
HC	High Court
QBD	Queens Bench Division of the High Court
Ch D	Chancery Division of the High Court
CA	Court of Appeal
HL	House of Lords
SCCO	Supreme Court Costs Office
ECJ	European Court of Justice
TCC	Technology and Construction Court

The information contained in this bulletin does not represent a complete analysis of the topics presented and is provided for information purposes only. It is not intended as legal advice and no responsibility can be accepted by Travelers Insurance Company for any reliance placed upon it. Legal advice should always be obtained before applying any information to the particular circumstances.